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SUPREME COURT, U.S.

NO. 80-1421

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROBERT LAWRENCE RIEGLER,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS (28 U.S.C. §1915, Rule 46)

Respondent, ROBERT LAWRENCE RIEGLER, by and through his attorney, Eugene Seltzer, moves the court for an order permitting him to proceed in forma pauperis, pursuant to the provisions of Title 28, United States Code, Section 1915, and in support thereof attaches the affidavit of said appellant.

EUGENE S. SELTZER
Attorney for Respondent

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ROBERT LAWRENCE RIEGLER,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED	i
RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	1
STATEMENT OF THE CASE AND STATEMENT OF FACTS	1
STATUTORY PROVISIONS INVOLVED	2
PETITIONER'S CONTENTIONS SUMMARIZED	2
RESPONDENT'S CONTENTIONS	2
ARGUMENT:	
I. A SEARCH WARRANT WAS REQUIRED TO SEARCH THE MAILED PARCELS.	3
II. THE CUSTOMS SEARCH DID NOT DEPRIVE THE RECIPIENT OF A REASONABLE EXPECTATION OF PRIVACY.	5
III. THE SEARCH WARRANT DID NOT AUTHORIZE THE SEIZURE OR OPENING OF THE PACKAGES.	6
IV. A "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE WOULD REWARD IGNORANCE OF THE LAW.	7
CONCLUSION	8

TABLE OF AUTHORITIES CITED

Cases

	Page
Arkansas v. Sanders (1979) 442 U.S. 753, 764-765 fn. 13	6
Cooper v. California (1967) 386 U.S. 58,62	4
Jankovich v. Indiana Toll Road Commission (1965) 397 U.S. 487, 491-492	4
People v. Brisendine (1975) 13 Cal.3d 528	4
People v. Dumas (1973) Cal.3d 871,880	6
People v. Whyte (1979) 90 CA.3d 235,243 [citations] (1980) Cert. den. 444 U.S. 1093	3
United States v. Andrews (1980) 618 F.2d 646, 652	5
United States v. Bulgier (7th Cir. 1980) 618 F2d 472	4
United States v. Chadwick (1977) 433 U.S. 1	7
United States v. Kelly (8th Cir. 1976) 529 F.2d 1365, 1370-71	5
United States v. Rivera (N.D. Tex. 1980) 486 F.Supp. 1025, 1034	6,7
Walter v. United States (1980) ___U.S.___; 100 S.Ct. 2395, 2402 fn. 12, 2403	5

Constitutions

California Constitution	
Article I	
Section 1.	2,4
Section 13.	2,4
Section 24.	2,4

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RESPONSE IN OPPOSITION

TO

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent ROBERT LAWRENCE RIEGLER, through his attorney, respectfully requests that this Court deny the Petition for Writ of Certiorari requested by the People of the State of California after the decision by the Court of Appeal, Fifth Appellate District, reversing the conviction of Respondent and the order denying the motion to suppress evidence.

STATEMENT OF THE CASE

AND

STATEMENT OF FACTS

Respondent hereby incorporates the Statement of the Case contained in the Petition for Writ and incorporates by reference the summary of the record of the case as described in the Opinion of the California Court of Appeal (Petition, Appendix A, pages 3-7).

STATUTORY PROVISIONS INVOLVED

Constitution of the State of California

Article I

§ 1. Inalienable rights
Section 1. All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.
(Added Nov. 5, 1974.)

§ 13. Searches and seizures; warrant
Section 13. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

§ 24. Rights not dependent on federal constitution; rights reserved to people

Section 24. Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.
This declaration of rights may not be construed to impair or deny others retained by the people.
(Added Nov. 5, 1974.)

PETITIONER'S CONTENTIONS SUMMARIZED

1. No search warrant is required in the setting of a "controlled delivery" after a Customs search of a mailed parcel.

2. A Customs search of a mailed parcel strips the addressees and subsequent recipients of any expectation of privacy in the parcel.

3. Even if a warrant was required for the package, the warrant obtained for the Fortner residence justified the search and seizure of the package at a different location.

4. The exclusionary rule should not be applied where police officers are in mistaken, but good faith, belief that they are complying with the law.

RESPONDENT'S CONTENTIONS

1. A search warrant is required in the "controlled delivery" setting under California law.

2. A Customs search of a package, unknown to the addressee or recipient, does not diminish the recipient's reasonable expectation of privacy.

3. A search warrant for a residence and things located therein does not justify the search of things seized elsewhere and searched elsewhere.

4. A "good faith" exception to the Exclusionary Rule would encourage ignorance of the law.

ARGUMENT

I. A SEARCH WARRANT WAS REQUIRED TO SEARCH THE MAILED PARCELS.

Under California law, a search warrant is required in the "controlled delivery" setting. People v. Whyte, 90 CA. 3d 235, 243 [citations] (1979); Cert. den. 444 U.S. 1093 (1980). In the case at bar, the actual search of the package was conducted by state agents after federal agents and customs authorities had relinquished control over the alleged contraband. Moreover, the "controlled delivery" here involved loss of visual contact and control over the movement of the packages for well over three hours and a distance of over one hundred miles. In fact, the investigating officers "lost" the packages in the Merced residence and did not know if one or both of the parcels had been moved from the residence to the vehicle which transported them across the State of California. (Petition, Appendix, Page 5).

The parcels cannot be said to have been in transit to the addressee after their delivery to the private residence. Thus, under the rule of Whyte, Supra, Petitioner cannot rely on the authority of the federal and customs agents who had previously opened the packages to justify the subsequent search of them. Id.

It is debatable whether there is a federal rule that obliterates the warrant requirement in the case of a "controlled delivery." Of those cases cited by Petitioner, it is notable

that there was always a constant visual contact or actual control over contraband in transit. Eg: United States v. Bulgier, 618 F.2d 472 (7th Cir. 1980). But regardless, the California standard is controlling where state agents are involved, even if that standard is more strict than the federal rule. Cooper v. California, 386 U.S. 58, 62 (1967).

In California, there is not only the California Constitution, Article I, Section 13, which almost verbatim copies the language of the Fourth Amendment, but we also have the general penumbra rights of privacy [Article I, Section 24]; People v. Brisendine, 13 Cal. 3d 528 (1975)] as well as an express right of privacy (Article I, Section 1). Where a state court's opinion relies on provisions in both the state and federal constitutions that are similar, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving the Supreme Court of jurisdiction to review the state judgment. Jankovich v. Indiana Toll Road Commission, 397 U.S. 487, 491-492 (1965). Respondent asserts that the California line of authority requiring warrants in the "controlled delivery" setting and the opinion below are based on authority and rules of law that flow from the California Constitution as it pertains to rights of privacy and freedom from unreasonable search and seizure. There is, therefore, a sufficient ground and adequate basis in California law to sustain the judgment and to deny certiorari.

Nor does Petitioner's reliance on the "border search" cases obviate the need for a warrant. It simply cannot be maintained that a package which goes through Customs in New York City is subject to a "border search" on the California Coast weeks later. See United States v. Almeida-Sanchez, 413 U.S. 266 (1973).

The argument that the package was still in constructive possession of federal, or even state agents must fail on another ground as well. The Respondent is charged with possession of marijuana for sale. The government may not claim that it had sufficient dominion over the marijuana to obviate Respondent's Fourth Amendment or California Constitutional rights while at the same time it is prosecuting him for a crime in which possession of the seized evidence is itself an essential element. "Proper administration of criminal justice should not include such contradictory assertions of governmental power." United States v. Kelly, 529 F.2d 1365, 1370-71 (8th Cir. 1976).

II. THE CUSTOMS SEARCH DID NOT DEPRIVE THE RECIPIENT OF A REASONABLE EXPECTATION OF PRIVACY.

There is no authority nor logical basis by which to support Petitioner's argument that a prior search of an object, unknown to the recipient, deprives him of a reasonable expectation of privacy in it thereafter. Walter v. United States, ___U.S.___; 100 S.Ct. 2395,2402 fn. 12, 2403 (1980), (lead opinion). Compare United States v. Andrews, 618 F.2d 646, 652 (1980) where the recipient had been advised by a federal agent that the contents of the package were known to authorities before the recipient accepted delivery of the package.

The case at bar does indeed differ factually from Walter, Supra. But Walter does not stand for the above proposition that Petitioner claims. As asserted by the California Court of Appeal in its opinion herein, an important element in the inquiry with respect to reasonable expectation of privacy is the foreseeability of a claim of privacy. Here, the packages were re-wrapped after the Customs search to look just as they did before the search, in an effort not to alert the suspects that a search had been performed. In effect, the government was trying to foster an expectation of privacy. Thus, the government

cannot now claim that a claim of expected privacy was not foreseeable. See United States v. Rivera, 486 F.Supp. 1025, 1034 (N.D. Tex. 1980).

The recipient had no way of knowing that the outward appearance of the package somehow inferred its contents. The package was wrapped in an inconspicuous manner and the "plain view" exception of Arkansas v. Sanders, 442 U.S. 753, 764-765 fn. 13 (1979) does not apply to diminish a reasonable expectation of privacy. Indeed, except to the investigating agents, the outward appearances of the mailed parcels gave absolutely no clue as to their contents.

III. THE SEARCH WARRANT DID NOT AUTHORIZE THE SEIZURE OR OPENING OF THE PACKAGES.

As indicated in the Opinion of the California Court of Appeal in the Petition herein (Appendix A, page 6) and according to the record in the case:

> The search warrant was apparently restricted to the premises, structures, rooms and receptacles of the Fortner residence at 1130 W Street, Merced, and did not provide for the search of any vehicle or persons.

Under Section 1525 of the Penal Code of California and Article I, Section 13 of the State Constitution:

> A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the persons and particularly describing the property and the place to be searched [emphasis added].

The particularity requirement has been interpreted strictly by California Courts:"... the constitutional requirement that a warrant particularly describe the place to be searched compels the conclusion that the privilege to search created by a warrant does not extend beyond the place or places described therein." People v. Dumas, 9 Cal.3d 871, 880 (1973). In Dumas, officers had a warrant to search for stolen documents in a particular house. They executed the warrant in the house and found no documents, but did find them in a car parked in front of the house.

The Supreme Court of California specifically held that the search and seizure of the documents was not authorized by the search warrant although other, exigent circumstances allowed for a warrantless search of the car.

Respondent contends that it is not absurd to conclude that the search warrant here did not justify a search and seizure that began over one hundred (100) miles from the place described to be searched by the warrant. Nor does Respondent contend that a separate warrant be obtained for each item that would have been seized from the residence where the warrant authorized a search. Such a conclusion does not follow from the judgment of the Court below. It simply restricts that authority of the warrant to the place specifically described in it.

Likewise, the legitimacy of the seizure of the package does not authorize its opening and search without a warrant. United States v. Chadwick, 433 U.S. 1 (1977). Nothing is disclosed in the record that would have prevented the seizing agents here from obtaining a warrant in the normal course of business. To argue that obtaining a warrant would cause additional burdens to the legal system simply begs the question as to the need for the warrant requirement. It would appear that such questions have long since been put to rest. Id.

IV. A "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE WOULD REWARD IGNORANCE OF THE LAW.

Petitioner complains that suppression in this case will lead to overwhelming confusion for the police officer in the field. As pointed out in the Opinion of the California Court of Appeal (Petition, Appendix A, page 11), there is a simple rule that has been enunciated that removes all confusion. Rivera, Supra, 486 F.Supp. at 1034.

The exclusionary rule has evolved to enourage police practice in conformity with the law. To permit "good faith" oversights and/or ignorance of the law to be an exception to the exclusionary rule would simply create an incentive to keep police blissfully ignorant of the law.

Moreover, it would create an entire new field of inquiry in the area of search and seizure. In many cases the issue of the subjective knowledge and the good or bad faith of a police officer will have to be litigated. Ascertaining the subjective intent and the moral quality of an officer's action is well nigh impossible in any event.

CONCLUSION

The California Court of Appeal correctly decided that the warrantless search of the mailed parcel was improper under California law.

A warrant was required because it is required in any event according to California law in the "controlled delivery" setting and because the mailed parcel here had actually been delivered and was no longer in control of the delivering officers.

The warrant issued for the search of the residence cannot be the source of authority to search an object searched and seized away from the residence.

For these reasons, Respondent submits that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Eugene S. Seltzer

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PROOF OF SERVICE

I am a citizen of the United States and am employed in the City and County of San Francisco, State of California; I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 2000 Center Street, Suite 303, Berkeley, California 94704.

On March 19, 1981, I served the within Response in Opposition to Petition for Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis on the Attorneys for Petitioner in said action by placing three true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Berkeley, California, addressed as follows:

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I, HELEN P. IWAMOTO, declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of March, 1981, at Berkeley, California.

Helen P. Iwamoto
HELEN P. IWAMOTO